

UPDATE ON THE CLEAN WATER RULE AND RELATED LITIGATION

Joint Legislative Oversight Committee on
Agriculture and Natural and Economic
Resources-Dec. 12, 2017

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- What is the Clean Water Rule?
 - Obama Era (2015) rulemaking defining scope of federal jurisdiction over “waters of the United States”.
- What happened after the Rule was issued?
 - Over 100 parties challenged the rule through 18 District Court actions and 22 petitions for review in federal appeals courts.
 - Nationwide stay granted while 6th Circuit Court of Appeals considered a preliminary question: should these rule challenges be filed in District Court first, or the Court of Appeals directly?
- Didn't the Trump administration repeal this rule?
 - Well yes (82 FR 34899 (July 27, 2017)). But since a rulemaking to replace a rule with a prior rule is itself a rulemaking, entire process must be followed.

- Sixth Circuit litigation (Murray Energy, et al. vs. Department of Defense et al.)
 - Consolidated many petitions on the “District Court vs. Court of Appeals” Question.
 - Did not reach ANY arguments regarding the merits of the rule.
 - Sixth Circuit found that this challenge regarding what constitutes “waters of the US” is reviewable directly in Courts of Appeals.
- Appealed to Supreme Court as “National Association of Manufacturers vs. Department of Defense”
 - Oral Argument October 11, 2017
 - “Strange bedfellows” on this jurisdictional question. Environmental groups on both sides.
 - Justices did inquire about mootness of the case in light of pending repeal—but rule is still pending, and the jurisdictional question will apply when the Trump era rule goes final and is challenged.

Questions?

(for more information on Supreme Court argument in NAM vs. Department of Defense , see:

<http://www.scotusblog.com/2017/10/argument-analysis-wading-themeless-pudding-clean-water-act-jurisdiction/>)

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